IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 20

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RESPONDENT'S BRIEF

FRED H. SKINNER,
H. H. RUMBLE,
Counsel for the Respondent.

FRED H. SKINNER,
JOHN MARSHALL,
Newport News, Virginia,
RUMBLE & RUMBLE,
Norfolk, Virginia,
Of Counsel.

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RESPONDENT'S BRIEF

The National Labor Relations Board, and The National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449) respectively will usually be referred to herein as the Board and the Act.

The Employees' Representative Committee will, in general, be referred to as the Committee, sometimes as the Intervener, sometimes as Plan of Representation of Employees, sometimes as the Plan; and Newport News Shipbuilding and Dry Dock Company, as the Respondent or the Company.

FOREWORD

With great reluctance, but impelled by a sense of duty, we bring to the attention of the Court at the threshold of this discussion, the character of the brief filed on behalf of the Board. In its brief, as will appear from what follows, the Board ignores the facts shown by a stipulation to which it was a party made at the time of the hearing; and seeks, by repudiation of its own supplemental certificate, to deprive this Court of the benefit of facts which the Board certified to the Circuit Court of Appeals as a part of the record in this case, and as such, were considered by that Court.

We specify:

The brief does not even mention the stipulation *to which the Board is a party*. This stipulation shows facts of the utmost materiality and importance in any phase of the case that has to do with the conduct of the Company and the legality or illegality of the Plan of Employee Representation now before the Court.

The stipulation (R. 75-78) is in part (italics ours) that:

> "For the purpose of expediting the hearing, it is stipulated and agreed between counsel for all the parties hereto . . . that the following is the evidence which will be submitted *without contradiction* for the intervenor . . . from which the Trial Examiner, the . . . Board or *any Court may determine the questions in issue:*
>
> "2. That from 1927 to the present the employees selected their representatives from the various districts by nominations and elections participated in only by employees below the rank of leading man and that none of the em-

ployees that participated in the election occupied any supervisory position.

"3. That the shipyard did not interfere with, select, discourage, encourage or in any way prevent the selection of representatives by the employees of representatives of their own choosing."

Also that nominations and elections of representatives are "conducted exclusively by the employees in accordance with regulations prescribed by the Executive Committee of the Employees Representative Committee", that nominations and elections are by secret ballot and "so conducted as to avoid undue influence or interference with the voters in any manner whatsoever, and to insure fairness in the counting of ballots (para. 8); and that "the ballots and all expenses of conducting the election has been borne by the Employees Representative Committee since July 5, 1935" (para. 9).

These are among the facts stated by the court below to be "proved by uncontradicted evidence or by stipulation". The Board's entire case rests upon a negation of these facts. Its argument consists of a fiery arraignment and denunciation of respondent and the Committee for having supposedly done and permitted the things which the Board stipulated the evidence "submitted without contradiction" would show had not been done.

2. The brief, p. 51, attempts to repudiate the Board's own certificate made to the Circuit Court of Appeals for the purpose of completing the record. (See "Supplemental Certificate of National Labor Relations Board" R. p. 215).

That the Board considered the data there referred to is shown by the fact that it held it immaterial (Decision R. 193-4). These facts were certified as "a part of the record" and as such considered by the court below.

No objection was made by the Board or its counsel to their consideration by the Circuit Court of Appeals. It comes with poor grace that this Board, so powerful in the scope and methods of its control over the business and industry of the nation, should, at this late day and in this Court, attempt, on technical grounds, to repudiate its own official act.

3. The brief is replete with arguments founded upon assumed, but non-existent, facts. It is reckless in its statements of purported fact. Some of its more glaring errors in that respect are referred to in the statement, some in the argument herein.

4. The brief is remarkable for its vindictiveness of spirit, no less than for recklessness of statement. Bitter denunciation takes the place of a calm review of the facts shown by the record. A barrage of adjectives and adverbs tends to conceal the fact that the Court is here dealing with a perfectly tranquil situation—with a plant where industrial peace in the real sense, that of normal and friendly relations between employer and employees, has prevailed during the life of the Company.

A few examples from the brief. All italics ours.

The legality of the Plan at the time of its adoption may be admitted "without in any way affecting the

undeniable fact that . . . . it was *simply* a creature *shackled* to respondent," etc. p. 22.

"Collective bargaining free from employer domination and interference was *plainly impossible*". p. 22.

"The Plan as *initiated* by respondent and its employees in 1927 consisted of a labor organization which was *completely* respondent's creature". p. 21.

* * * "respondent's *domination, interference* and *support* continuing in *open defiance* of the Act." p. 23.

* * * "respondent's *thorough domination, support,* and *interference* with the Plan." p. 40.

"Moreover, the plan's history of management participation and support has *inevitably* shaped the attitude of the employees toward it as a plan tied up *inextricably* with respondent's interests." p. 34.

"Respondent's *efforts to suppress all freedom of choice.*" p. 40.

All these and many other lurid expressions are used of an organization which the Board stipulated would be shown by evidence submitted "without contradiction" to be one in which the employees have always selected representatives of their own choosing free from employer domination or interference. See Stipulation R. 75, particularly paragraphs 2, 3, 8, 9 and 13.

QUESTION INVOLVED

We cannot agree that the question presented in this case is that stated by counsel on page 21 of their brief. That that question arises here we deny. On the contrary, the Circuit Court of Appeals expressly recog-

nized that upon such a finding, if supported by substantial evidence, the Board has authority to require the employer to withdraw all recognition from the organization as the representative of his employees.

Thus, the court said (Opinion R. 227):

> "When the Board finds that an employer has created and fostered a labor organization of its employees, and has dominated its administration, in violation of Section 8 of the National Labor Relations Act, and the finding is supported by substantial evidence, the Board has authority under section 10 (c) of the Act to require him to withdraw all recognition to the organization as the representative of his employees. This rule was established in Labor Board v. Greyhound Lines, 303 U. S. 261, and Labor Board v. Pacific Lines, 303 U. S. 272, and has been followed and applied by this court. * * * (Citing cases)."

The Circuit Court of Appeals was careful to point out that it has uniformly followed and applied the rule laid down by this Court in the two Greyhound Lines cases, *supra*.

What the court below did do was to disapprove the ultimate finding of the Board to the effect that the Employees' Representative Committee is incapable of serving the employees as their genuine representative for the purpose of collective bargaining. The court held that the inference that the Employees' Representative Committee is "still the creature of the Company", to use the language of the Board, cannot reasonably be drawn; that "there is no reasonable ground upon which the disestablishment of the organization of the men can

be sustained"; and that the "purpose of the act will not be served by destroying an organization that is without doubt the chosen representative of the majority of the employees." (Opinion, R. 230).

The real question involved here is somewhat broader than that raised by petitioner's specifications of error, brief p. 13.

It is, whether the Circuit Court of Appeals erred in holding that "when all of the circumstances of the case are considered, including not only the findings in the Board's opinion, but also the additional undisputed facts above set out (in the opinion), the inference that the Employees' Representative Committee 'is still the creature of the Company', to use the language of the Board," cannot be reasonably drawn, and that "there is no reasonable ground upon which the disestablishment of the organization of the men can be sustained."

If there was no error in this holding, then there was no error in the refusal of the court to enforce paragraph 2 (a) of the Board's order, or in setting the same aside.

STATEMENT

As already remarked, the statement contained in the Board's brief is in many respects erroneous, and incomplete. This necessitates a statement here, which largely accounts for the regrettable length of this brief.

First: This is not the case of a "company union" whose formation was initiated by the employer in order to combat the efforts of an "outside" union to organize the company's employees. *Ballston-Stillwater, etc. Co. v. National Labor Relations Board* (2nd Cir.) 98 Fed.

(2) 758; 761. Contrary to the Board's contention, the company did not "initiate" the plan, and the Board points to no evidence that it did. There is no such evidence to point to. The most that may fairly be inferred from the evidence is that respondent was sympathetic, and cooperated with its employees in putting the plan into effect.

Nor is there any similarity between this case and the cases cited on behalf of the Board, namely, the two Greyhound Lines cases, *supra*, and National Labor Relations Board *v.* Fansteel Metalurgical Co., 306 U. S. 240. In each of these cases the employer was violently anti-union. In some of them employees were coerced into joining company unions with threats of discharge in case the employees joined another union; in some the company instigated the formation of a union in the midst of a bitter labor war in its plant.

Second: There has not been and there is not now any labor dispute between the company and the employees (Robeson, R. 75; Trenwith, R. 78-9; Fenton, R. 79; White, R. 80). The evidence clearly shows and the court below found that there had been no labor dispute for over 43 years prior to the hearing (Opinion of Court below R. 229). This period of time about covers the life of the company. In another phase of this matter, Newport News Shipbuilding and Dry Dock Company v. Bennett F. Shauffler et al, 303 U. S. 54 at page 91 of the record in that case, Judge Way of the District Court, who has resided in this vicinity for many years, said:

"I think that is a fact of which this Court might well take judicial notice, that during the many years which complainant[1] has been in business in this vicinity it has a record, so far at least as the public has known, remarkably clear of conflict between it and its employees."

Third: The proceedings in this case were not initiated by employees of the company. The employees have not asserted any grievance against the company. They are, through the Employees' Representative Committee, parties to these proceedings, protesting before this Court the validity of the Board's order requiring the disestablishment of their union.

These proceedings were initiated by a so-called National union, The Industrial Union of Marine and Shipbuilding Workers of America, an affiliate of the C. I. O. with headquarters at Camden, New Jersey (Van Gelder, R. 11).

The Complaint

The principal charge of the complaint was that respondent, on various dates between March 3, 1937 and June 7, 1937, had discharged and refused to reinstate seven individuals therein named because they had joined the above mentioned union and were active in its behalf. The Trial Examiner, James C. Paradise, dismissed the complaint as to three of the men but sustained it as to the remaining four. (R. 186). On exception to the intermediate report of the Trial Examiner, the Board disapproved his findings and conclusions in this latter respect, sustained respondent's

1—Respondent here.

contention that these four men had been laid off with numerous others[2] because of lack of work in the Shipyard, and without reference to the union activities, if any, of the individuals involved; and dismissed the complaint as to them. (R. 203).

The complaint further charged that respondent in 1927 had put into force and effect at its plant a plan known as "Representation of Employees", and that it had continuously fostered, encouraged and dominated the same and contributed financial and other support thereto. The Trial Examiner sustained this charge and made certain recommendations in respect thereto. (Intermediate Report, R. 185). The Board sustained the Trial Examiner in the main as respects the Plan of Representation, and issued its order, August 9, 1938 (R. 203), which, in addition to its negative requirements, ordered certain affirmative action, including the requirement that respondent withdraw all recognition from the organization known as "Representation of Employees" and completely disestablish the same (Paragraph 2(a) R. 203).

The Circuit Court of Appeals, for reasons fully set out in its opinion, disapproved and set aside the latter requirement.

It may be noted that although more than two years have elapsed since the hearing before the Trial Examiner, and more than one year since the date of the Board's order, the Plan has been functioning to the satisfaction of the employees, whose relations with respondent, as always, have continued cordial and friend-

2—The Board in its decision (R. 201) correctly refers to this as "A general layoff".

ly, and that there has been at respondent's plant no labor trouble of any kind. Industrial peace has prevailed. In this connection it should be emphasized that neither in the complaint, in the testimony before the Trial Examiner, or otherwise, has it been charged, or even suggested, that the employees have been in any way imposed upon. In other words, there has been and is no claim on the part of anyone, notwithstanding the Board's theoretical claim of possible dangers, that the Plan has operated, *in fact*, to stifle the independence of respondent's employees, or been in any way used to their disadvantage. On the contrary, as the testimony shows and the court below held, it has worked to their benefit.

The great majority of respondent's employees are natives of Virginia and North Carolina. Of the total number at the time of the hearing, 4131 were born in Virginia, 925 in North Carolina, 1099 in other States and 282 in foreign countries. (Respondent's Exhibit 9, R. 170).

Respondent's business is that of designing and building ships, in the main vessels for the United States Navy. It is a matter of general knowledge that this is a highly technical business, requiring highly intelligent, skilled labor. It is not likely that men of this stock and character would submit to domination or interference in their affairs by the employer. Had the respondent at any time attempted to stifle their independence of thought or action, they would have asserted themselves. The fact that the employees have not done any such thing but, on the contrary, have contested these proceedings from their inception, is evidence of the fact that

the Board's fears are groundless; and its conclusion, without merit.

Respondent has never been anti-union. For years, many of its employees have belonged to the American Federation of Labor. Some of its departments are completely unionized (Tighe, R. 142). The employment of its men and the tenure of their jobs, has never been influenced by the question whether they or any of them held union cards. Robeson, R. 68, Rhinesmith, R. 54, Beazlie, R. 56, Tighe, R. 144, Blanton, R. 48-49 (the last named being the Board's witness). This testimony is nowhere contradicted.

The court below said:

> "There has been no action on the part of the management or by any officers or persons in a supervisory capacity in the Shipyard to discourage membership in any union." (Opinion R. 229).

Fourth: At the hearing and again in its exceptions and brief before the Board, respondent objected to all evidence regarding any of the various plans of employee representation in existence prior to the Act of 1935. The ground of the objection was that the plan in existence at the time of the hearing was essentially different from any of the preceding plans, and that evidence of prior plans encumbered the record to no good purpose, and confused the true issue. The Trial Examiner overruled these objections and, apparently, the Board sustained the ruling. The Court did not pass on the point so raised. As the Board again deals at great length with the various plans existing before the pass-

age of the Act in 1935, it would seem necessary for us to reply, but in so doing we do not waive our objections, heretofore made. On the contrary, we respectfully insist that the objections were well taken and should have been sustained. The 1937 plan is in truth the real issue before the Court.

THE ORIGINAL PLAN OF EMPLOYEE REPRESENTATION ADOPTED 1927.

In the year 1927 respondent's employees in an election held for the purpose voted to form the organization sometimes referred to in the record as "Plan of Employee Representation". No employee who occupied a supervisory position voted in the election (Stipulation, para. 1 and 2, R. 75). There is not even a suggestion in the evidence to support the complaint that in 1927, more than 12 years ago, respondent caused to be put into effect this plan of employee representation. The record does not show who initiated the Plan. The most that may be inferred from the evidence is that the Respondent was in sympathy with the purpose of the Plan, and cooperated in putting it into effect.

The preamble of the plan adopted in 1927 reads:

> "In order to give the employees of the Company a voice in regard to the conditions under which they labor, and to provide an orderly and expeditious procedure for the prevention and adjustment of any future differences, and to anticipate the problem of continuous employment, a method of representation of employees is to be established" (Board's Exhibit 14, R. 160).

The independence of the representatives was guaranteed by the following clause eleven:

GUARANTEEING THE INDEPENDENCE OF REPRESENTATIVES

> It is understood and agreed that each Representative shall be free to discharge his duties in an independent manner without fear that his individual relations with the Company may be affected in the least degree by any action taken by him in good faith in his representative capacity.
>
> To insure to each representative his right to such independent action, he shall have the right to take the question of an alleged personal discrimination against him, on account of his acts in his representative capacity, to any of the Superior Officers, to the Joint Committee and to the President of the Company. (R. 165).

A similar clause in substantially the same language, or to the same effect, is contained in each revision of the plan (1931 Plan, Art. IX, R. 157; 1937 Plan, Art. VIII, R. 152).

This plan was set up for the purposes of collective bargaining and functions for that purpose. (Board's witness, Blanton, R. 39).

It was not alleged in the complaint nor claimed in the course of the hearing that respondent foisted this plan upon its employees; nor is it accurate to imply, as does the Board, that respondent was the actor in putting plan into effect. Respondent by its answer to the complaint averred that in cooperation with its employees in 1927 it *aided* in putting into effect at its ship-

yard a plan of employee representation. (R. 6). The plan was voted on by the employees and adopted by an overwhelming majority; 2,430 voting for the plan, 204 against, and 8 votes were void. The employees then elected their representatives (Intervener's Ex. 2; R. 170-71) and the plan became effective as a bargaining agency.

It was certainly understood that respondent would recognize the organization for purposes of collective bargaining, and it has always done so. As an agency for that purpose, it has functioned well. Through it the employees have, from time to time, taken up with the Company questions relating to wages, hours and conditions of labor, and always secured satisfactory results. Wilkins, R. 92, 93, 101, 108-9; Travis, R. 127-129; Blanton, Board's witness, R. 39.

The Court below said that:

> "The management of the Shipbulding Company has always been willing to negotiate with the Committee in regard to any matter affecting wages, hours, or conditions of work, and the committee has been successful from time to time in securing changes in these respects beneficial to the men." (Opinion R. 229).

There was nothing illegal about this plan at the time of its adoption, nor at any time thereafter prior to the enactment of the National Labor Relations Act. It was designed to promote friendly relations between employer and employee, secure normal cooperation between them, and thus insure industrial peace. In the attainment of these desirable ends it has been notably successful.

Fifth: At the instance of the employees, the plan was revised in 1929, 1931, 1934 and 1936. But as none of these revisions effect the issues they will not be dealt with in detail. For example, it cannot be material to any issue in the case to consider, as do Counsel for the Board (brief 8-9 and 23), that when the company was short of work, the employee representatives agreed, at the suggestion of the company, that their compensation as representatives should be reduced from the $100 theretofore paid them annually to $60 per year, or that, thereafter when new construction contracts were obtained this reduction was restored, or that the Secretary of the General Joint Committee was paid $5.00 per month by the Company. At that time this arrangement was not obnoxious to any law then in existence, nor was it morally wrong. And the arrangement was open and known to all. There was nothing secret about it. But it is material to note that these payments ceased with the 1937 plan (R. 36). The Board's statement of the case does not mention this fact.

In the original plan, and in all of the revised plans, an employee, to be eligible to vote or to election as a representative, must be below the grade of leading man or supervisor. This requirement has always been observed. There has been no contention to the contrary.

THE EXISTING OR 1937 PLAN OF EMPLOYEE REPRESENTATION

In May 1937 after this Court had sustained the constitutionality of the Act, the employees on their own initiative changed the Plan. The change amounted to an adoption of a new plan. The purpose of this was to

make the plan conform both in letter and spirit to the Act. (Wilkins, R. 91). The Board's statement, brief p. 10, as to how the Plan originated, is wrong.

The facts are that Blanton, the Board's witness, drafted what he called a complete re-write of the book (R. 50). He took this to Robeson, the "Management Representative" appointed as such under the express provisions of the then existing plan (R. 43). Robeson thought he should call in Woodward, the Company's General Manager, that he, Robeson, "might go out on a limb" (R. 73). Robeson telephoned Woodward, who came down to Robeson's office (R. 51) and the three had an informal talk (R. 73) about Blanton's "re-write" of the plan (R. 50). Blanton's "re-write" still provided for company appointed representatives and that the company pay $100 a year to the elected representatives. Woodward objected to company representatives on the committee and at his suggestion this provision was eliminated. The effect of this change, made at Woodward's suggestion, was to deny to the company any voice in the operation or functioning of the plan. Blanton's provision for payment to the elected representatives was subsequently eliminated by the elected representatives (Blanton, R. 36) when Blanton's plan was submitted to them, as now to be explained.

Following Blanton's conference with Robeson and Woodward he submitted his plan, as changed in that conference, to the Executive Committee (Blanton, R. 40, Board's Ex. 12, R. 158; Ex. 13, R. 159). That Committee referred the plan to the General Joint Committee, which in turn referred it to a separate meeting of the *elected* representatives (Blanton, R. 52, Board's

Ex. 12, R. 158). The elected representatives made some changes and as changed by them reported it back to the General Joint Committee with recommendation that it be adopted. (Board's Ex. 13, 159; Blanton, R. 52). The plan as changed by the elected representatives was unanimously approved and adopted by the General Joint Committee (Intervenor's Ex. 4, R. 171) "with no change" (Blanton, R. 53).

Notwithstanding the reckless statement in the Board's brief that Robeson and Woodward took an *active part* in the 1937 revision, and that they made *"numerous changes"* in the draft submitted by Blanton (brief p. 25), the fact is that the *only change* suggested by either of them was that suggested by Mr. Woodward that all provision for Company representation on the Committee be eliminated. This conference was sought by Blanton, not by the Company. (Blanton, R. 51; Robeson, R. 73).

Sixth: The employees desired the original plan; they desired each revision and they desire the existing 1937 plan.

Seventh: On June 7, 1938, after it became known that the Trial Examiner had recommended to the Board that the Company be required to withdraw recognition from and to disestablish the Plan as the bargaining representative with the Company, the employees held another referendum on whether they wished to continue or discontinue the plan. 4068 voted. Of that number 3455 voted to continue the plan, 562 voted to discontinue it and 51 ballots were void. (Supplemental Certificate of Board, R. 215).

Eighth: At the hearing before the Trial Examiner the Board, the Intervener and the Company stipulated (R. 75) that evidence introduced "without contradiction" would show in part as follows:

> 2. That from 1927 to the present the employees selected their representatives from the various districts by nominations and elections participated in only by employees below the rank of leading man and that none of the employees that participated in the election occupied any supervisory position.
>
> 3, That the shipyard did not interfere with, select, discourage, encourage or in any way prevent the selection of representatives by the employees of representatives of their own choosing.
>
> 4. That the entire shipyard for the purpose of the nominations and election of the representatives was divided into geographical districts so as to give each craft and each group of workmen a representative.
>
> 8. * * * * * * *
>
> Nominations and elections of representatives are conducted exclusively by the employees and in accordance with the rules and regulations prescribed by the executive committee of the Employees Representative Committee, and as set forth in the plan, nominations and elections are by secret ballot and so conducted as to avoid undue influence or interference with voters in any manner whatsoever, and to assure fairness in the counting of ballots.
>
> 9. The ballots used in the election are printed and furnished by the employees and the election conducted by employees eligible to participate in the election and selected by the execu-

tive committee. The ballots and all expenses of conducting the election has been borne by the Employees Representative Committee since July 5, 1935, out of the funds contributed by the employees for expenses of the committee sent to Washington in 1929 and 1930.

The Board's brief does not even mention that there was such a stipulation.

Ninth: The Board in its brief, in utter disregard of the facts shown in the record by stipulation and by the testimony of numerous witnesses, asserts that respondent attempted to prevent the selection by the employees of representatives of their own choosing. It speaks, brief, p. 40 of

> "Respondent's efforts to suppress all freedom of choice."

The utter absurdity of this assertion is shown by the stipulation, para. 2, 3 and 13, R. 75 and 76, and by the uncontradicted testimony of Rhinesmith (R. 54), Beazlie (R. 56), Evans (R. 57), Rudder (R. 64), Boyd (R. 138), Carter (141) and Tighe (R. 144), and others.

For example, Robeson testified (R. 72) as follows:

> By MR. KEARNEY:
>
> Q. During the time that this plan has been (in) operation—and the evidence here is that it has been in operation since 1927—are you aware of any activity or effort on the part of the management of the shipyard, or any of the officials, with regard to who might be selected or who should not be selected to represent the employees?

A. No, sir. The effort has been otherwise, if I might say so—to safeguard it.

Q. By that do you mean the effort has been to leave the selection of the representatives of the employees entirely up to the men?

A. Yes, sir.

Q. Without any interference?

A. Yes.

Q. Or domination on the part of the company or any of its officials?

A. Yes, sir.

When Solomon Travis was on the stand the following occurred, as appears at page 130 of the record:

By MR. KEARNEY:

Q. Do you know of any instance in which the shipyard encouraged or discouraged the election of any particular man—

MR. BLUM: That is objected to.

By MR. KEARNEY:

Q. For representative?

A. Never since I have been in the yard.

MR. KEARNEY: Just a minute. There is an objection.

"TRIAL EXAMINER PARADISE: What is the objection? (question?)

"MR. KEARNEY: Do you know of any instance in which the shipyard discouraged or encouraged, and by 'shipyard' I meant any man in a supervisory capacity, the election of any man as a representative of the employees?

"TRIAL EXAMINER PARADISE: I do not think there is any testimony in the case that they did, except possibly in the case of Mr. Blanton.

"MR. KEARNEY: I understood that, but am I confined in rebuttal to just what they have here, or can not I go ahead with positive proof?

"TRIAL EXAMINER PARADISE: *There is no basis for any finding by the Board that they did.* I do not see that it would add anything for you to prove that they did (not?). The objection is sustained" (Italics supplied).

This was after the Board had closed its case (R. 54). Neither before nor after it closed, was there any evidence that Respondent had ever interfered with the Employees' freedom of choice. On the contrary, there was, in addition to the stipulation, abundant evidence that it had not. The court below was clearly right when it rejected the conclusion of the Board and said (Opinion, R. 228):

> "During the whole life of the plan from 1927 until the time of the hearing before the trial examiner in August and September 1937, the company has not interfered with, discouraged, encouraged or in any way prevented the selection by the employees of representatives of their own choosing."

Tenth: Witness William H. Bell.

This was a thoroughly discredited witness. He testified for the Board and the Board itself refused to credit his testimony. Why counsel for the Board required that any part of the testimony of this witness be included in the printed record we cannot understand.

They have made no reference to this testimony in their brief. Lest they have in mind to make use of it in their reply to Respondent's brief, we think it advisable to show here that Bell, as a witness, was thoroughly untrustworthy.

He had been "laid off" in June 1937 with several others and was called as a witness by the Board for the purpose of proving that these discharges were discriminatory. Bell testified, with a wealth of detail, of a telephone conversation which he claimed he overheard while waiting in the office of the employment manager of the DuPont Plant at Ampthill, near Richmond, on June 29, 1937. Of this testimony the Board said in its decision (R. 201):

> "One matter remains for disposition. The Trial Examiner, in reaching the conclusion that Bell, Anderson, Wright, and Dillon were discriminatorily discharged, relied upon certain testimony of Bell regarding a telephone conversation allegedly overheard by him while waiting for an interview in the office of the employment manager of the DuPont plant at Ampthill on June 29. On that day, Wright, Anderson, and Dillon were working at the Ampthill plant. Bell's testimony, in substance, is that the employment manager, in Bell's presence, received a telephone call from the respondent's yard in the course of which the person initiating the call characterized Wright, Anderson, and Dillon as 'agitators'. The respondent's witnesses denied making the call, and the acting manager of the local telephone exchange at Newport News testified that the records of the telephone company fail to show that such a call was made. Upon the entire record we are unable to find

that the respondent did, in fact, make the telephone call in question.

A perusal of Bell's testimony will show that in other particulars he contradicted himself. But aside from further discrediting a witness already shown to be unworthy of belief these instances are not material here.

PROCEEDINGS BEFORE THE BOARD

The action of the Board and the question which arises on this writ have been indicated in the foregoing statement of facts. It should here be noted that at the time of the hearing before the Trial Examiner, the Employees Representative Committee, by leave of the Board, intervened in the proceedings by motion which included an answer (R. 7) denying that it is company-dominated; and that it actively participated throughout the hearing.

As respects the Employees Representative Committee, the Board made certain alleged findings of fact, and conclusions of law (R. 192). Many of its supposed findings of fact are mere argumentative statements without support in the evidence. Thus (R. 197):

> "Manifestly, from the plan's inception in 1927 until its final revision in 1937, the respondent dominated, assisted, and interfered with the administration of the labor organization whose structure is set forth in the plan, in its revised as well as in its original form."

At page 10 of the Board's brief, Counsel state this as a definite finding by the Board, without disclosing

its argumentative character. They ignore the use of the word "manifestly" with which it begins.

This follows an analysis of the plan prior to 1937, and is based solely upon that analysis.

The Board made *inter alia* the following ultimate finding:

> "We find that the respondent has dominated and interfered with the formation and administration of the Employees' Representative Committee of the Newport News Shipbuilding and Dry Dock Company, sometimes called Representation of Employees, and has contributed support to it, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act. We find, further, that the Committee is incapable of serving the respondent's employees as their genuine representative for the purposes of collective bargaining."

An examination of the Board's findings upon which this ultimate conclusion was based will show that they are without support in the evidence. That respondent did not dominate or interfere with the administration of the Committee at any time throughout the life of the organization is shown by the stipulation agreed to by the Board (Stipulation paragraphs 2, 3, 8, 9 and 13, R. 75). That respondent contributed to the support of the Committee when it was lawful to do so, is admitted. This contribution was in the form of nominal compensation to elected representatives for their services. But when the constitutionality of the National Labor Relations Act was upheld, the plan was amended by the employees, and all provision for compensation was

eliminated, and ceased when the 1937 plan became effective. There is no evidence in the record of any other contribution except the fact that the booklet containing the 1937 plan was printed at Company expense (Stipulation par. 10, R. 77); and that prior to the hearing the Secretary caused the minutes of the Committee meetings to be copied (mimeographed) on a mimeograph at the correspondence office of the Company and copies sent to employee representatives through the yard messenger service in envelopes used in that service.

These envelopes and the yard messenger or mailing system are available for the free use of any employee for private and personal use (Blanton, R. 43; Wilkins, R. 89, 40, 104-5, 110, 111).

There is no evidence that the company knew the Secretary was having his minutes copied in the Company's correspondence office (R. 74) or that he was using the yard messenger system as a means of distributing them to the Committee representatives. Wilkins testified that he obtained the envelopes which he used from wastepaper baskets where they are allowed "to accumulate until they serve the purpose." They had not been thrown away. "They were to be used by anyone who came along and wanted an envelope" (R. 105).

Even had the Company known of these things which Wilkins frankly admitted he did in behalf of the Committee, it is hardly likely the company would have objected any more than it would have objected to any other employee doing the same things. As we have stated, the record shows beyond doubt that any employee could have done any of these or similar things.

But there was no wilful violation of the Act in any of these things. Respondent did not at that time believe the Act applied to it, or that the Board had any jurisdiction over it. It was engaged solely in production. Decisions of this Court had uniformly held that production, in itself, was not commerce.

That the Board attached undue importance to these trivial matters is obvious.

The Trial Examiner made his intermediate report as of March 9, 1938 (R. 177-186). After his recommendations that respondent be required to withdraw all recognition from the Committee and to completely disestablish the same, had become known among the employees, they held a *referendum*, June 7, 1938, for the purpose of ascertaining the sentiments of the employees with respect to continuing the Committee as their bargaining agency, or disbanding the same. An overwhelming majority of the employees voted to continue the Committee (Supplemental Certificate of the National Labor Relations Board, R. 215-219). The results of this referendum were brought to the attention of the Board by Counsel for the intervener, prior to the decision of the Board, with the request that it be made a part of the record[3]. The Board declined this request on the ground that it was improperly made under its rules and that the data sought to be made a part of the record was immaterial to the determination of the issues (R. 193).

Thus the Board held that the wishes of the employees were not to be taken into account, and that it

3—Counsel for the Board erroneously state that this data was brought to the attention of the Board by counsel for the respondent.

was immaterial what organization they had chosen to represent them. In so doing the Board denied to the employees "the right to self organization" guaranteed by section 7 of the Act.

After respondent had filed its petition for review with the Circuit Court of Appeals, and the Board had filed in that court what purported to be a complete transcript of the record, the Board under circumstances hereinafter stated p. 36, voluntarily certified the said data as "a part of the record in the above entitled matter, previously certified to this Court under date of September 6, 1938" (Supplemental Certificate, 215). By making this Certificate the Board waived compliance with its rules.

The data shown by this supplemental certificate was a part of the record on which the case was heard by the Circuit Court of Appeals. It was the right any duty of that Court to consider it. Now in its brief, the Board, for the first time, tries to repudiate its certificate. This the Board cannot do, post p. 77. *Newcomb* v. *Wood*, 97 U. S. 581.

PROCEEDINGS IN THE COURT BELOW.

The Circuit Court of Appeals fully recognized the rule established by this Court in the two Greyhound Lines cases, *supra*, and was careful to point out that it has uniformly followed and applied this rule, citing a number of its own decisions in which this had been done. But it said (R. 228):

> "In setting out the factual basis for the application of this rule of law in the pending case,

the Board made no mention of certain facts that were proved either by uncontradicted evidence or by stipulation of counsel. The omission doubtless occurred because in the opinion of the Board the facts referred to were immaterial to the issue; but, in our view, they must be taken into consideration since they bear directly upon the inquiry whether or not the Employees' Representative Committee is capable of representing the employees in collective bargaining, free from domination or interference by the employer."

The facts shown by uncontradicted testimony and by stipulation thus ignored by the Board are set out at length in the majority opinion (R. 228-230). They are also set out in this brief, post pp. 40, 41, 42.

The Court differed from the Board in some respects in its interpretation of the Plan, particularly sections VI and IX of the 1937 revision. It did not confine itself to the written plan as a source of facts. On the contrary it looked to the whole record and considered facts shown by uncontradicted testimony and by stipulation. The Court below had, in the decisions of this Court, ample precedent for so doing.

International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291, 297.

Federal Trade Commission v. *Curtis Publishing Company*, 260 U. S. 568.

In taking into account "uncontradicted evidence" which the Board discarded, the Court below did no more than was done by the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Sands Manufacturing Company*, 96 Fed (2)

721; and no more than was approved by this Court when it affirmed that decision 306 U. S. 332, 83 L. Ed. 488.

This important decision is not so much as mentioned in the Board's brief in this case.

The court below sustained the negative portions of the Board's order; but, for reasons fully set out in the majority opinion, disapproved and set aside so much of the affirmative portion as required the respondent to withdraw all recognition from the Employees' Representative Committee and to completely *disestablish* the same. The true issue here is thus presented by the action of the court below in disapproving and setting aside that portion of the Board's order[4].

SUMMARY OF ARGUMENT

1. The Board cannot be permitted to disregard its own stipulation or repudiate, as it attempts to do, its certificate made to the Circuit Court of Appeals for the purpose of completing the record.

There is no substantial evidence in the record to sustain the findings of the Board with respect to the Employees Representative Committee. Those findings were based chiefly upon the Board's analysis and interpretation of the Plan of Employee representation itself. The Board's inferences derived from a study of the plan are not facts, and are not binding upon the Circuit Court of Appeals, or upon this Court.

2. The failure of the Board to consider the uncontradicted evidence referred to by the Court below, was

4—Respondent promptly posted the order required by the Circuit Court of Appeals in accordance with the requirements of its decree, and notified the Board of that fact, as directed by the decree.

arbitrary and unreasonable. By "failing to mention" facts proved by uncontradicted evidence, the Board could not exclude those facts and the uncontradicted evidence by which they were established, from consideration by the Circuit Court of Appeals upon review of the Board's findings and order.

3. The National Labor Relations Act, Section 10 (e) confers upon the reviewing court power.

> "to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board."

This language, adopted from the Federal Trade Commission Act (U. S. C. Title 15, Section 45) has been construed by this Court to mean that the reviewing court has the power to examine the whole record, and ascertain for itself the issues presented and whether there are material facts not reported by the administrative body.

> *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568, 579.
>
> *International Shoe Company v. Federal Trade Commission*, 280 U. S. 291, 297.

Congress, in providing for review of the findings and orders of the National Labor Relations Board, used, so far as material here, the identical language which it had employed in providing for review of the findings and orders of the Federal Trade Commission. It must be presumed to have done so with full knowledge of the construction placed upon that language by

this Court in the cases above cited; and to have intended that the same construction should be given to it in Labor Board cases.

Where the National Labor Relations Board has disregarded "uncontradicted evidence" the Circuit Court of Appeals may consider that evidence in connection with the Board's findings, and reach its own conclusions.

National Labor Relations Board v. *Sands Manufacturing Company*, 96 Fed. (2) 721, affirmed 306 U. S. 332.

The power of review conferred by the National Labor Relations Act upon the Circuit Court of Appeals is broader than the statutory power of that Court to review orders of the Board of Tax Appeals. But even in tax cases the ultimate finding of the Board of Tax Appeals is a question of law, or at least a mixed question of law and fact. It is subject to judicial review, and on such review, the court may substitute its judgment for that of the Board.

Helvering v. *Tex-Penn Oil Co.*, 300 U. S. 481, 491.

The finding of the Labor Board in the instant case to the effect that the Employees Representative Committee was company-dominated, and incapable of serving the employees as an independent bargaining agency, is an ultimate finding which is subject to judicial review.

4, 5 and 6. The Court below correctly held that this finding was not supported by evidence. It correctly held that when all the circumstances of the case are considered, including not only the findings in the

Board's opinion, but the additional "undisputed facts" set out in the opinion of the court, but not mentioned by the Board, the inference that the Employees' Representative Committee is still the creature of the company cannot reasonably be drawn; and that there is no reasonable ground upon which the disestablishment of the organization desired by the men can be sustained.

7. From the fact that the court below enforced the negative portions of the Board's order it cannot, in the circumstances, be justly inferred that the court held respondent guilty of violating the Act. It is apparent the Court meant only to bar the resumption of acts admittedly done when they were lawful, but which ceased when they became unlawful.

8. There is no error in the decree of which the Board can complain.

ARGUMENT

I.

The Board Cannot Be Permitted To Repudiate Its Own Stipulations and Certificates

The main thesis of the Board's brief is that respondent has dominated the Employees' Representative Committee, and interfered with the selection by the employees of representatives of their own choosing. This, of course, is not surprising, since its whole case rests upon that theory. What is surprising is that any Governmental agency should attempt, in this Court, to repudiate its own stipulations and certificates.

THE STIPULATION

The Board says, brief p. 43, that despite the Court's statement to the contrary the evidence was in many respects not "uncontradicted" and continues thus:

> "The court was in error, for example, in stating (R. 228) that respondent, during the life of the Plan had not in any way interfered with the selection by the employees of representatives of their own choosing. That was precisely the basic question at issue, and the court's statement is contrary to the conclusion of the Board and all the evidence upon which it was based."

We agree that "this was precisely the *basic question* at issue". But the point is that the Board decided it contrary to the evidence, including its own stipulation. Its finding of domination and interference is contrary to that stipulation (R. 75). Pertinent portions are found *ante* pp. 2, 3, 19, 20.

There is not a particle of evidence in the record to contradict this stipulation.

Continuing counsel say, brief p. 43:

> "Again, the statement by the court (R. 228) that all expenses of the elections under the Plan since 1937 have been borne by the employees is directly contrary to the undisputed evidence that respondent not only allows the elections to be held on its property, but also pays the clerks and judges of the elections for the time spent in such activity (R. 44, 46, 107)."

Here again they run counter to the Board's stipulation. Paragraph 9 of the stipulation reads:

"9. The ballots used in the election are printed and furnished by the employees and the election conducted by employees eligible to participate in the election and selected by the executive committee. The *ballots and all expenses of conducting the election* has been borne by the Employees Representative Committee since July 5, 1935, out of the funds contributed by the employees for expenses of the committee sent to Washington in 1929 and 1930" (R. 76). (Italics ours).

Elections have been held on Company property; but it is not true, as stated in the Board's brief that respondent pays the clerks and judges of election. Counsel's reference to the record on this point is to the testimony of Blanton, who, when asked (R. 46) who paid for the services of judges and clerks of elections in the election of June, 1937, replied that they were all salaried men, "and there isn't any question about the pay of salaried men." The plain inference is that no deduction was made from their stated salaries, nor were they paid extra.

Continuing counsel say, brief, p. 43:

"Finally, the statement of the court (R. 229) that respondent has not discouraged membership in any union is contradicted by all the evidence of support accorded to the Plan, with the consequent discouragement of other union activity."

This statement of the Court is fully supported by Section 13 of the Board's stipulation, and by the uncontradicted testimony of Robeson, R. 68; Rhinesmith,

R. 54; Beazlie, R. 56; Tighe, R. 144, and Blanton, R. 48-49, the last named being the Board's witness.

We respectfully submit that the Board is bound by the stipulation made at the hearing, and may not thus cast it aside.

Cupples Co. Mfgrs. v. *National Labor Relations Board*, 106 Fed. (2) 100 at p. 118.

THE BOARD'S SUPPLEMENTAL CERTIFICATE

Counsel for the Board also attempt to repudiate its supplemental certificate (R. 215) filed with the Circuit Court of Appeals showing the results of a referendum held in June, 1938, and the extent of employee participation in elections held by the plan. After respondent had filed its petition for review with the Circuit Court of Appeals, and the Board had filed in that court what purported to be the transcript of the record, respondent was about to take legal steps to have this data made a part of the record. Thereupon the Board voluntarily certified the said data as *"a part of the record in the above entitled matter,* previously certified to this court under date of September 6, 1938" (Italics supplied).

At page 51 *et seq.* of their brief counsel for the Board erroneously state that the data thus certified by the Board as "a part of the record" was offered in a letter from *respondent's* counsel. Such is not the case as an inspection of the Board's supplemental certificate (R. 215) and the letter (R. 216) clearly show. The data was offered by Counsel for the intervener (Board's decision R. 193).

This data was certified to the court as "a part of the record." As such it was intended that the court should consider it. No objection to its doing so was made in that court by counsel then representing the Board. Now, however, the Board's counsel say in their brief, p. 52.

> "We submit that the data should not have been considered by the court."

Counsel would thus repudiate a certificate solemnly made by the Board for the use of the court as "a part of the record," and relied upon by opposing counsel.

The Board cannot be permitted thus to play fast and loose with the courts and with the citizen. Having certified this data as "a part of the record," which the court was intended to consider, and did consider, it may not in this Court, and at this late day, make an objection which was not made in the court below.

As heretofore stated, the Board by making this certificate, waived compliance with its rules. When it failed to object to its use in the court below, it waived the point. *Newcomb* v. *Wood*, 97 U. S. 581. See p. 77 post.

We may add that the principal fact shown by this supplemental certificate, though highly important, was but one of the many "uncontested facts," set out in the opinion of the court below, and that the other uncontested facts fully support the action of the Court in refusing to enforce clause 2 (a) of the Board's order.

But in saying this we do not recede from the position taken above, or abate in the slightest degree our condemnation of this attempt on the part of the Board

to repudiate its own certificate, an act which is unfair not only to respondent and the intervener, but to the court below.

II.

THE BOARD'S FAILURE TO CONSIDER THE UNCONTRADICTED EVIDENCE REFERRED TO BY THE COURT BELOW, AND TO GIVE IT APPROPRIATE EFFECT, WAS ARBITRARY AND UNREASONABLE.

In the exercise of its judicial function the Board may not cull out such parts of the evidence as tend to support a particular theory of the case; and discard uncontradicted evidence bearing upon the issue, but not comporting with that theory. It is required by the Act itself, Section 10 (c), to make its findings "upon all the testimony taken." This is but one of those fundamental requirements which are of the essence of due process in a proceeding of a judicial nature. *Morgan* v. *United States*, 304 U. S. 1-26.

> "The National Labor Relations Board has wide discretion in administering the National Labor Relations Act, 29 U. S. C. A., para. 151 et seq., but in so doing it must deal fairly with all the parties. It has the duty to decide the case before it on all the evidence and should not arbitrarily cast away all the undisputed evidence that is inconsistent with its findings."
>
> *Waterman Steamship Co.* v. *National Labor Relations Board*, 5 Cir. 103 Fed. (2) 157, 160, *certiorari* granted.

In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 83 L. Ed. 131, 138, this

Court held that the refusal of the Labor Board to hear the testimony of two witnesses was "arbitrary and unreasonable," and an "abuse of discretion." It would have been no less arbitrary and unreasonable, if the Board had received the testimony of those witnesses, and then ignored it—treated it as though it were not in the record.

Precisely that the Board did in the instant case. The evidence so ignored was highly important, and was uncontradicted, much of it stipulated. Both the majority and minority opinions below assume that the Board's reason for discarding these facts and the uncontradicted evidence by which they were proved, was that it thought them immaterial. Whether or not they were material is, of course, a question of law. The Board, by discarding them as immaterial, cannot preclude the Court from considering them on review. Under such circumstances, the right of review by the Circuit Court of Appeals would be frustrated; its exercise but an idle ceremony.

The facts thus ignored by the Board are set out in detail in the majority opinion (R. 228-230). See post pp. 40, 41, 42.

The Court below recognized the rule laid down in the two Greyhound Lines cases, *supra*. But it said (R. 228):

> "In setting out the factual basis for the application of this rule of law in the pending case, the Board made no mention of certain facts that were *proved either by uncontradicted evidence or by stipulation of counsel*. The omission doubtless occurred because in the opinion of the Board

the facts referred to were immaterial to the issue; but, in our view, they must be taken into consideration since they *bear directly upon the inquiry* whether or not the Employees' Representative Committee is capable of representing the employees in collective bargaining, free from domination or interference by the employer. These facts are as follows[5] (Italics ours):

"During the whole life of the plan from 1927 until the time of the hearing before the trial examiner in August and September, 1937, the company has not interfered with, discouraged, encouraged, or in any way prevented the selection by the employees of representatives of their own choosing *(Stipulation, para. 2 and 3, R. 75-76)*.

"All employees below the grade of leading man, who have been on the payroll for sixty days prior to the date fixed for nominations, are entitled to vote *(Stipulation, para. 8, R. 76)*. The entire shipyard is divided into districts for the purpose of nominations and elections, so as to give each craft and each group of workmen a representative *(Stipulation, para. 1, R. 76)*.

"Nominations and elections are conducted exclusively by the employees in accordance with rules prescribed by the Executive Committee of the Employee's Representative Committee. The plan requires that nominations and elections shall be made by secret ballot and shall be so conducted as to avoid undue influence or interference, and to insure fairness in the count. The ballots used are printed and furnished by the employees, and all expenses of the election since

5—In here quoting from the opinion, we have supplied after each statement a reference to the uncontradicted evidence by which it is proved. These references appear in italics.

1935 have been borne out of a fund contributed by the employees in 1929 and 1930 *(Stipulation, para. 8 and 9, R. 76)*.

"A majority of the employees in each voting district are satisfied with the plan and with what has been accomplished under it *(Stipulation, para. 13, R. 78)*.

"In 1927 the plan was submitted to the employees for their adoption or rejection, and it was adopted by a vote of 2,430 to 204 *(Stipulation, para. 1, R. 75)*.

"On June 15, 1937, 5,718 out of 6,300 eligible voters at work on that day, elected 43 representatives on the Employees' Representative Committee, 28 white and 15 colored, to serve from July 1, 1937, to June 30, 1938 *(Stipulation, para. 5, R. 76)*.

"On June 7, 1938, after the employees had been notified of the recommendation made by the trial examiner on March 9, 1938, that the Employees' Representative Committee be disestablished, a referendum with reference to the continuance of the plan was held. 3,455 workers voted to continue the plan, 562 voted to discontinue the plan, and 51 ballots were void. *(Supplemental Certificate of Board, R. 215)*.

"On June 14, 1938, the annual election was held. 4,233 out of 4,889 men present at work elected 43 representatives to serve from July 1, 1938, to June 30, 1939. 42 votes were thrown out *(Supplemental Certificate of Board, R. 215)*.

"The management of the Shipbuilding Company has always been willing to negotiate with the Committee in regard to any matter affecting wages, hours, or conditions of work, and the Committee has been successful from time to time in securing changes in these respects bene-

ficial to the men *(Travis, R. 127-129; Wilkins, R. 92, 93, 101, 108, 109; Carter, R. 142; Blanton, 39)*.

"There has been no action on the part of the management or by any officers or persons in a supervisory capacity in the shipyard, to discourage membership in any union *(Blanton, R. 48-9; Robeson, R. 68; Rhinesmith, R. 54; Beazlie, R. 56; Tighe, R. 144)*.

"For more than forty-three years prior to the hearing, there has been no labor dispute or disturbance that has interfered with the operation of the yard *(Fenton, R. 79; Trenwith, R. 78-79; Robeson, R. 72)*.

"In addition to these uncontradicted facts, it is noteworthy that equal representation of the management and of the men on the joint committee prior to July 5, 1935, was not obnoxious to any statute then in force. The revision of the plan in 1937 was undertaken for the purpose of bringing the plan into literal harmony with the statute after doubts as to the constitutionality of the statute had been quieted by the decision of the Supreme Court in *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, on April 12, 1937" *(Wilkins, R. 91)*.

The Court then discussed Articles VI and IX of the plan as amended in 1937, sustained the contention of respondent and the Employees Representative Committee as to the meaning and effect of these articles, noted the fact that since the hearing the features which the Board regarded as objectionable had been eliminated from them and concluded as follows:

"When all the circumstances of the case are considered, including not only the findings

in the Board's opinion but also the additional undisputed facts above set out, the inference that the Employees' Representative Committee 'is still the creature of the company', to use the language of the Board, cannot, in our opinion, be reasonably drawn. It was certainly not reprehensible for the men to confer with the management when important changes were to be made in a plan, lawful in its inception, that had served long and successfully to foster peaceable relations and satisfactory working conditions in the plant; and there is no reason to doubt the sincerity of the declaration in the preamble of the revised plan that the purpose was to ensure the employees of the company full freedom in self-organization and in the designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. Consequently, there is no reasonable ground upon which the disestablishment of the organization of the men can be sustained."

III.

It Was Within the Power and Province of the Court Below to Consider the "Uncontested Facts" Mentioned in Its Opinion.

The Act Confers Upon the Circuit Courts of Appeals Power to Review Orders of the National Labor Relations Board and Authorizes the Court to Examine the Whole Record and Ascertain for Itself the Issues Presented, and Whether There Are Material Facts Not Reported by the Board.

Until Congress shall have enacted a uniform law governing the judicial review of decisions and orders

of administrative bodies, each statute creating such a body must stand upon its own footing; and the scope of the review contemplated by it must be determined by the language by which the power of review is conferred in that particular statute. The courts may not reduce the review procedure to a least common denominator when Congress has not seen fit to do so. Cases dealing with the power of the Circuit Court of Appeals on review of decisions of the Board of Tax Appeals, for instance, are not apposite in considering the power of that Court to review orders of the National Labor Relations Board. The power, in each instance, is conferred by a different statute, and by widely different language. In the case of the Board of Tax Appeals, the power of review is conferred by the following language:

> "Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."
>
> Section 1003 (b) of the Revenue Act of 1926, C. 27, 44 Stat. 9 I. R. C. Section 1141 (c) (1).

The jurisdiction of the Circuit Courts of Appeals to review decisions of the Board of Tax Appeals under this statute has, from the time of its enactment, been held by those courts to be limited to errors of law, though the court might look to the record to determine whether the Board's findings of fact were supported by evidence. These early decisions by Circuit Courts of

Appeals are in harmony with the later decisions of this Court.

Phillips v. *Commissioner of Internal Revenue*, 283 U. S. 538-605.

Helvering v. *Rankin*, 295 U. S. 123-134.

In the last named case it is said that if the Board of Tax Appeals has failed to make an essential finding and the record on review is insufficient to provide the basis for final determination, the proper procedure is to remand the case, and this, even though the findings omitted by the Board might be supplied from an examination of the record.

A much more ample power of review is conferred by the language of the Federal Trade Commission Act, as construed by this Court.

International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291, 297.

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568.

THE REVIEW PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT WERE TAKEN FROM THE FEDERAL TRADE COMMISSION ACT

In *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373, 83 L. Ed. 229-320, this Court recognized that the provisions of this Act with respect to a judicial review of orders of the National Labor Relations Board follow closely the statutory provisions for review of orders of the Federal Trade Commission. The fact is that the review provisions of the National Labor Relations Act (Sec. 10 (e) are *borrowed* from

the Federal Trade Commission Act (U. S. Code, Title 15, Sec. 45) and are expressed in substantially identical language.

In *Federal Trade Commission* v. *Curtis Publishing Co., supra,* this Court said:

> "Manifestly, the court must inquire whether the commission's findings of fact are supported by evidence. If so supported, they are conclusive. But, as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order, *the court must also have power to examine the whole record and ascertain for itself the issues presented, and whether there are material facts not reported by the commission.* If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be, remanded to the commission,—the primary fact-finding body,—with direction to make additional findings; but, if, from all the circumstances, it clearly appears that, in the interest of justice, the controversy should be decided without further delay, the court has full power under the statute so to do. The language of the statute is broad, and confers power of review not found in the Interstate Commerce Act" (Italics ours).

The same rule was approved in International Shoe Co. v. Federal Trade Commission, 280 U. S. 291, 297.

When Congress adopted, and embodied in the National Labor Relations Act, this language from the Federal Trade Commission Act, it must be presumed to have done so with full knowledge of the construction

placed upon that language by this Court in the above decisions, and to have intended to adopt that construction along with the language[6].

The reenactment, in the same or substantially the same terms, of a statute which has received judicial construction, amounts to a legislative adoption of such construction.

United States v. *Falk*, 204 U. S. 142.
Heald v. *District of Columbia*, 254 U. S. 20

The same rule applies in the construction of a statute enacted after a similar or cognate statute has been judicially construed.

Bruce v. *Tobin*, 245 U. S. 18.
United States Navigation Co. v. *Cunard S.S. Co.*, 284 U. S. 484

The dissenting opinion in the court below rests upon the theory that the court ought not to consider "other facts not mentioned by the Board," and the learned Judge who wrote the dissent seemed to think that the power of the court in this respect "is no broader

6—That the procedure under this Act and the Federal Trade Commission Act is substantially the same was conceded by the General Counsel for the National Labor Relations Board when in testifying before the Senate Committee on Education and Labor at its hearings held April 25, 1939 (Part 2, page 381) he said:

"I would like to recall that when this act was before Congress this committee said in its report:

'Despite the widespread charges that the bill invokes novel procedure and vests unusual powers in an administrative agency, the bill is modeled closely upon numerous Federal statutes setting up administrative regulatory bodies of a quasi-judicial character. The common procedure is so well known that this committee deems it unnecessary in substantiation of this statement to refer to any analogous statutes save the Federal Trade Commission Act, section 5.'"

than in cases coming from the Board of Tax Appeals." This, we submit, is fundamentally erroneous. It overlooks the difference between the very limited review provided by the Tax Statute, and the broader powers conferred upon the court in reviewing decisions of the Federal Trade Commission and of the National Labor Relations Board. It was doubtless because he believed the court could not consider "other facts not mentioned by the Board," and in accordance with that belief refused to consider them himself, that the learned Judge dissented.

The power of the court to consider "other material facts not reported by the (Federal Trade) Commission" is expressly recognized by the above decisions. Where there is "substantial evidence relating to such facts from which *different* conclusions reasonably may be drawn" the matter may be and ordinarly should be remanded with directions to make additional findings; but even here,

> "if from all the circumstances it clearly appears that, in the interest of justice the controversy should be decided without further delay, the Court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act";

and we may add, not found in the Tax Statute above quoted.

This is not a case in which the evidence relating to the omitted facts is such that different conclusions may reasonably be drawn from it. Here the omitted facts are "undisputed", often shown by stipulation, (R.

75). The power of the court to end the controversy without delay in such a case cannot be questioned. This was the situation in *National Labor Relations Board* v. *Sands Manufacturing Company*, 96 Fed. (2) 721, 724.

In that case the Circuit Court of Appeals for the Sixth Circuit, considered the uncontradicted evidence in connection with the Board's findings, precisely as did the court below in the instant case; and its action was approved by this Court. After stating that the findings of the Board as to facts, if supported by evidence, are conclusive, the Circuit Court of Appeals, in that case, said:

> "The contention here is that the Board refused to make certain findings supported by the evidence, and that its conclusions either are based on no evidence, or are contrary to the Board's own findings of fact. The facts for the most part are not in dispute, and the principal question is whether the Board's findings, taken together with the admitted facts, compel a different conclusion." *Affirmed*, 306 U. S. 586. 332

And that Court *did* reach a different conclusion.

On *certiorari* the question before this Court was thus stated by Mr. Justice Roberts:

> "The respondent contends and the court below held that upon the findings of fact, and the uncontradicted evidence, the Board's conclusions are without support in the record. The petitioner insists that there is evidence to support them. From the findings, and the uncontradicted evidence, these facts appear."

And this Court then proceeded to review the uncontradicted evidence as well as the Board's findings of fact. 306 U. S. 586, 83 L. Ed., 488.

This decision, in the Sands case, was not announced in time to influence the opinions and decisions below: but it affords ample support for the majority opinion.

Moreover, the Board's finding in the instant case that the Employees Representative Committee was incapable of serving the employees as an independent bargaining agency, is an ultimate finding, which, even in cases coming from the Board of Tax Appeals, is subject to judicial review.

> "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the Court may substitute its judgment for that of the Board."
>
> *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, at page 491.

But as indicated above, the limited review provided by statute in case of decisions of the Board of Tax Appeals does not apply to decisions of the National Labor Relations Board; and hence Tax decisions, such as *Helvering* v. *Rankin, supra,* and *Helvering* v. *National Grocery Co.*, 304 U. S. 282, are not controlling here.

Swayne & Hoyt v. *United States*, 300 U. S. 297, cited in the dissenting opinion is also not in point. The Court in that case was dealing with an order of the Sec-

retary of Commerce under the Shipping Act. In United States Navigation Co. v. Cunard S. S. Co., *supra*, this Court pointed out that the Shipping Act, as respects rates and practices of carriers by water, closely parallels provisions of the Interstate Commerce Act relating to carriers by rail, and that the latter act having received judicial construction, Congress must have intended the Shipping Act to be given the same construction. As previously noted, this Court, speaking of the Federal Trade Commission Act, said in Federal Trade Commission v. Curtis Publishing Company, *supra*, "The language of the statute is broad, and confers powers of review not found in the Interstate Commerce Act." Neither are like powers of review found in the Shipping Act; but they are found in the National Labor Relations Act.

Counsel seem to concede that in thus considering evidence of facts "not reported" by the Board, the Court below did not transcend its powers. Thus, at page 42 of their brief, speaking of this evidence, they say:

> "That evidence in the record concerning which the Board did not make particular findings of fact (*Supra*, p. 36) had, of course, been considered by the Board in making the findings it did. Consequently, the court could properly have considered it along with all of the other evidence in the record in determining whether the Board's findings were adequately supported."

Later, however (brief 35-56), counsel contend, in effect, that the reviewing court can in no event make final disposition of the case where the Board has not made essential findings, but must, in all such cases re-

mand the cause to that body. This is undoubtedly true of cases coming from the Board of Tax Appeals. *Helvering* v. *Rankin, supra.* But it is not true in Federal Trade Commission cases or Labor Board cases, except where the evidence of the omitted facts is of such a nature that different conclusions may reasonably be drawn from it. We have fully discussed this, *ante* p. 48, and need not repeat what was there said. But perhaps it should be said again that the evidence in the instant case is not of that nature. Here the evidence of the facts which the Board failed to "mention" was uncontradicted, much of it stipulated by the Board at the hearing. That situation was not present in any of the cases cited by the Board at p. 54 of its brief. In the instant case there was no "picking and choosing . . . . among uncertain and conflicting inferences" as in Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, 73 and in Federal Trade Commission v. Standard Education Society, 302 U. S. 112, 117, cited by the Board. The question before the court below was precisely the same as the question before the Circuit Court of Appeals for the Sixth Circuit in the *Sands* case, *supra*. That question was whether the Board's findings taken together with the undisputed facts "compel a different conclusion" from that reached by the Board. Stated differently, the question was whether upon the whole record the Board's findings and conclusions were supported by the evidence. And that is the question here.

The answer to the Board's argument on pages 35-56 of its brief is, that what it there condemns, this Court approved in the Sands Case, *supra*. Significantly

enough, the Board fails to mention that case anywhere in its brief.

We may add that should the Court be of opinion that the Circuit Court of Appeals should have remanded the case to the Board for further findings, as counsel seem to suggest, then this Court should in no event direct that clause 2 (a) of the Board's order be enforced; but rather that the case be remanded to the Board for additional findings, on the undisputed evidence which, to quote from the Board's brief, page 53 (3) was "NOT MADE THE SUBJECT OF PARTICULAR FINDINGS BY THE BOARD."

IV.

THE COURT BELOW NOT ONLY HAD THE POWER TO EXAMINE THE WHOLE RECORD AND ASCERTAIN FOR ITSELF THE ISSUES PRESENTED, AND WHETHER THERE ARE MATERIAL FACTS NOT REPORTED BY THE BOARD, IT WAS ITS DUTY TO DO SO.

As we believe we have shown, the power of the court below to consider the "undisputed facts" mentioned in its opinion, and the justice and propriety of its doing so, are recognized and upheld by the decisions of this Court, culminating in the Sands Manufacturing Company case, *supra*. (See Point III).

Here we would stress the duty to exercise that power. If the court were possessed of the power to look to the whole record, and consider "undisputed facts" disclosed thereby, but under no duty to do so, it would not be a court in the sense of American or English jurisprudence, certainly not a court of equity.

The reviewing courts are not mere agencies for the enforcement of the Board's orders. By the express terms of the Act they are courts of equity. This Court in the Ford Motor Company case, *supra*, referred to the duty of these courts, as courts of equity, to administer justice according to equitable principles governing judicial action. It recognized the power of such a court to adjust its relief to the exigencies of the case in accordance with those principles. Thus the Chief Justice, speaking for the Court, said (305 U. S., at page 273):

> "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with *equity* powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.* The purpose of the judicial review is consonant with that of the administrative proceeding itself,—*to secure a just result with a minimum of technical requirements.* (Italics supplied).

We submit that the dissent below was founded upon an erroneous conception of the scope of the court's power of review under the Act. The Judge believed that the court had no right or power to consider any facts "not mentioned" by the Board. Upon that ground his criticism of the majority opinion is based.

If the Board by the simple expedient of failing to "*mention*" undisputed facts disclosed by the record, could exclude those facts from the consideration of the court, then the intent of Congress in conferring the

broad powers of review found in this Act would be defeated. A review by the court would, in such case, be but an idle ceremony and a delusion.

But the power of the court to consider facts shown by the record but "not reported" by the Board is now apparently conceded by the Board itself (brief, p. 42). And, conceded or not, that power is recognized by this Court. See Point III, *supra*. Hence the foundation for the dissent is swept away.

Because of his view of the limited power of the court on review, the learned dissenting judge considered none of the "undisputed facts", referred to in the majority opinion and therefore adopted the findings and conclusions of the Board. The dissent must be read in the light of this fact.

Counsel for the Board say (brief p. 55) that the court below sought to justify its action in looking to the whole record by characterizing the facts on which it relied as uncontradicted and they say:

> "Yet actually, as already noted, the court fell into error in stating that respondent had not interfered with freedom of choice; that it had not discouraged union activity among the employees; and that all expenses of elections under the Plan since 1935 have been assumed by the employees."

Since every one of these facts is shown by a stipulation made by the Board at the hearing (R. 75) and there was no evidence to the contrary, it is difficult to see how the court could have done otherwise than it did.

Moreover the Chairman of the Board has admitted that these facts were proved on the record before the Board. Thus:

In the hearings before the Senate Committee on Education and Labor, 76 Cong. 1st session, held April 19, 24 and 25, 1939, to consider amendments to the Act, Mr. Madden, Chairman of the Board, was asked (Part 2, p. 323) by Senator Ellender the following question:

> "Senator Ellender. Well, the reason I ask that question is that I would like to bring in this Newport News Shipbuilding and Drydock versus the National Labor Relations Board case.
>
> "Here was a case, and I am reading from an excerpt from the case itself, wherein the facts were as follows:
>
> "1. During the whole life of the committee the company did not interfere with the selection by the employees of representatives of their own choosing.
>
> "2. Any employee 21 or over, and an American-born citizen, and on the pay roll a year, could be a representative. An employee on the pay roll 60 days could vote.
>
> "3. Nominations and elections were conducted solely by the employees.
>
> "4. On several occasions the employees had indicated their approval of the plan by voting for representatives in large numbers and by a vote to continue the committee.
>
> "5. The management of the company was always willing to negotiate with the committee.
>
> "6. There was no action on the part of the management to discourage any union.
>
> "7. For more than 43 years there was no labor dispute or disturbance at the plant.

"Now, I am just wondering how a case like that, with the facts as were found, as I have just read them, was ever brought before the Board?"

* * * * * * *

"Senator Ellender. But they were really the facts found by the Board?

"Mr. Madden. No; they were *facts* which were *proved in the record before the Board,* but which we did not make findings on before because we thought they were immaterial. Two of the three judges thought that they were material, and so in their decision they add them to the other facts which were in the Board's findings" (Italics ours).

This is the answer to the assertion of counsel at page 56 of their brief that "the findings of the Board were on the whole record." That assertion we deny, as we do also the assertion on the same page that no essential finding was lacking in the Board's decision. As previously noted, some of the Board's findings were mere argumentative statements and cannot be properly considered definite findings of fact.

V.

The Employees' Representative Committee Has Functioned Well As An Agency for Collective Bargaining.

At page 44 of the Board's brief counsel make the amazing statement that

"the Plan has not resulted in a single collective agreement covering wages, hours or working

conditions during the 9 years the Plan had been in effect up to the time of the hearing."

This is a clear misstatement of fact. Irving Clark Wilkins, Secretary of the Committee, examined by counsel for the Intervener, testified (R. 92, 93, 94, 99, 100) that agreements covering wages, hours and conditions of work had been effected through the action of the Committee.

And again at R. 108-9:

"Redirect examination by Mr. Kearney:

"Q. Mr. Wilkins, Mr. Blum asked you about the minutes of April 13th, with regard to the action taken by the manaagement, with regard to matters concerning the employment of the men. Will you read the minutes of that meeting—what that action was?

"A. (Reading.) 'The Committee recommends that the General Joint Committee request the management to allow overtime for hours worked in excess of 40 hours in any one week. Overtime for other purposes to remain as at present, that is, time and one-half for any work in excess of 8 hours in any one day, and double time for Sundays and legal holidays now recognized by the Company, and that the week-end be changed to 7 a. m. on Monday instead of as at present, making Saturday the 'penalty' day for most of the overtime in any one week.

'We further recommend that on the last week on the present basis the yard remain open on Saturday in order that the hourly employees may be able to make a full week, and suggest that special arrangement be made by the management to take care of certain weekly men

working seven days a week, such as watchmen, power house attendants, yard maintenance men, and so forth.

'We understand these men now earn a day a month vacation, whereby one day could be drawn from this vacation allowance to make them a full week. This week-end change would also make it possible for men losing time, due to bad weather, to make a full week by working Saturday.

'If the above recommendations are adopted the management to issue the necessary orders giving the date effective, and the details of operation.'

'The Committee suggests that the management discourage working Saturdays and Sundays, as most workmen wish this time off.

'We believe that by more intensive planning and cooperation a great deal of the so-called emergency work can be avoided.'

"That was the end of the recommendation.

"Q. Was that recommendation accepted?

"A. I will have to modify that. There was one other paragraph in this recommendation.

"Q. All right. Read that.

"A. (Reading) 'It was called to the Committee's attention that in some instances an employee having worked eight hours is sent home and called back to work after only eight hours' rest period, which required a man to work sixteen hours out of twenty-four. This question, however, does not come in line with the work designated for this Committee, but we mention it for the management's consideration.'

"Q. Now, the recommendations you made, were they accepted and acted upon by the management?

"A. It was. The management accepted it."

This detailed and uncontradicted testimony of Mr. Wilkins the Board's counsel ignore, and for their unfounded assertion quoted above, refer to Mr. Wilkins cross-examination at R. 99-100, which was to the effect that agreements between the employees and the company with respect to wages, hours and conditions of work usually take the form of requests or recommendations recorded in the minutes of the Committee and agreed to orally and put into effect by the management; and not of formal contracts *signed* by the company. Apparently the Board takes the view that unless an agreement is in writing, it is without force or effect.

Counsel for the Board believed and cited Mr. Wilkins' testimony on cross-examination. They could not have been unaware of his testimony in chief, as above quoted.

For additional testimony showing that the Committee has functioned satisfactorily as an agency for collective bargaining, see Blanton, R. 39; Travis, R. 127-129.

VI.

THE CIRCUIT COURT OF APPEALS RIGHTLY REFUSED TO ENFORCE PARAGRAPH 2 (a) OF THE BOARD'S ORDER, REQUIRING WITHDRAWAL OF RECOGNITION FROM THE EMPLOYEES' REPRESENTATIVE COMMITTEE, AND THE DISESTABLISHMENT OF THE SAME.

If, as the Act professes, and has so often been said, its purpose is to protect commerce by promoting and

preserving industrial peace, then its policies will be best effectuated by leaving the Committee undisturbed as the court below has left it. In this field, as elsewhere, it has functioned well.

As indicated in the statement at the beginning of this brief, this case is unique in that it did not grow out of any controversy or labor dispute of any kind between Respondent and its employees.

At Respondent's plant there is peace in fact, not merely a theoretical peace. That kind of a peace counsel for the Board do not seem to understand. They speak of it as a "truce", though indulge their imaginations as to circumstances attending it.

A truce follows hostilities. Respondent's plant has never known hostilities. The Board's counsel regard this long era of peace with suspicion—as a lull before a possible storm (R. 44). It has been a long lull—lasting throughout the history of the Company, and for twelve years since the Plan was formed.

The Board says, through its counsel, that this *peace in fact* cannot be substituted for the "stable" peace contemplated by the Act. If by "stable peace" the Board means that sort of peace which we have witnessed in certain industries—the steel and automobile indutries for instance, since the Board began to function there, we pray to be delivered from it. We prefer peace in fact, even though it be less exciting.

The Board's brief consists of an elaborate discussion of imaginary evils which, in theory, might result from the language of the plan itself, abstractly consid-

ered. Its entire argument is based upon assertions utterly lacking factual support.

We quote from page 40 of the Board's brief, this choice bit of restrained argument, which is a fair sample of its treatment of this entire case, and which is not only without factual support in the record, but goes directly in the teeth of the "undisputed" facts mentioned by the court below (R. 228-230), many of them shown by stipulation and all of them by uncontradicted evidence. See pp. 40, 41, 42, *ante*.

> "The claim that the employees, by their participation in the elections and by their vote in the referendum, have evidenced their free acceptance of the Plan, is entirely lacking in substance. It casually assumes that *respondent's efforts to suppress all freedom of choice have been unavailing. In view of respondent's thorough domination, support and interference* with the Plan, the attitude of the employees toward it was and is necessarily shaped thereby. By the same token, the existence, membership, and functioning of the Plan must be ascribed, in large measure, to that influence." (Italics supplied).

Even the Trial Examiner said that there was no basis in the evidence for any finding by the Board that Respondent or any of its employees in a supervisory capacity had interfered with the employees' freedom of choice. See R. 130.

And see extract from testimony of the Chairman of the Labor Board, *ante*, pp. 56, 57.

CLAUSE 2 (a) IS INVALID BECAUSE UNREASONABLE AND NOT SHOWN TO BE NECESSARY

This *peace in fact*, existing at the time of the hearing, and unbroken for more than forty-three years prior to the hearing, exists today. There is not now and never has been any *menace* to *commerce* in the presence of the Employees' Representative Committee. Unless commerce is adversely affected, or there is reason, based upon *fact*, not *speculation*, to believe that it will be so affected, the Board has no authority to act. We deny that there is anything in the evidence to warrant a belief either that commerce is or will be menaced, if this drastic order is not enforced. For that reason, we deny the power of the Board to make the order. Such an order cannot be supported by guess, suspicion, speculation or by eloquently expressed theories of counsel. It must be bottomed on facts.

The menace to commerce must be real, not imaginary.

Not only does the record disclose no necessity for paragraph 2 (a); it affirmatively shows there is no such necessity. We submit that the Board was without power to pass this part of the order; and that paragraph 2 (a) was void *ab initio*.

ALSO INVALID BECAUSE PUNITIVE

In the Consolidated Edison Company Case, *supra*, this Court held that the authority of the Board to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employee any penalty it may choose because he is en-

gaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order. Clause 2 (a) of the Board's order was purely punitive in its origin and in its intended operation and effect. The Board lacked power to make it.

THE BOARD CONFESSES ERROR

In footnote 6 to the Board's brief at p. 9 counsel say:

> "The Board's decision erroneously states (R. 197) that the nominations and elections were to be arranged for by the management's representatives."

This is a more serious error than, at first blush, might be supposed. It deserved more than a footnote.

The Board's finding appears at R. 197, and is

> "Elections were arranged for by management representatives, 'but insofar as possible conducted by the employees themselves.'"

The Board here confused the functions of "the representatives of the management" and those of the Management's Representative."

Prior to 1937 all of the plans provided for "representatives of the management" and for a "Management's Representative" (See Articles 5 and 6 of 1931 Plan—R. 155). The former were representatives appointed by the Company and were equal in number to the elected representatives. The "Management's Representative" was one man (Mr. Robeson).

The functions of the "representatives of the management" and of the "Management's Representative" were wholly different. The former were on committees and functioned as committeemen. The duties of the latter may be said to be those of an intermediary. Precisely, his duties were to keep the Company "in touch" with the representatives as a whole, and to represent the Company in negotiating with them, their officers and committees. It was one of his stated duties to "respond promptly to any request from representatives, and to interview all of them from time to time, but not less frequently than once every month, with reference to matters of concern to employees, and report the result of such interviews to the Company." Under the 1937 plan there are no "representatives of the management" on the Committee.

ELECTIONS

Thus by its own admission the Board erred when it found as a fact that "elections were arranged for by the management's representatives" (Board's decision R. 197). The error is fundamental because it goes to the whole case now before the Court. It cannot be cured merely by confessing error. This erroneous conception of a material feature of the case necessarily affected the Board's findings of fact regarding the conduct of the Company and, therefore, necessarily affected its conclusions of law and its order thereon.

The facts are that the plan provided that the Company should designate a Management's Representative (in this case Mr. Robeson was designated) who should be the person to represent the Company in negotiations

with the committee, its representatives and officers (1931 Plan, Art. VI, R. 155). He was a member of no committee. He had no vote.

By the express provisions of Article IV of the 1931 plan (R. 154) he, the Management's Representative (in this case Mr. Robeson) should arrange for nominations and elections. This provision was doubtless made because nominations and elections were held on the Company property, and it was thought that someone representing the Company should have charge of the physical arrangements, such for example, as the placing of the ballot boxes and chairs and tables customarily found at voting places in any election. And this is all that the provision could mean, because, by sub-paragraph 3 of Article IV, it was provided that insofar as possible nominations and elections shall be "conducted by the employees themselves in accordance with rules and regulations prescribed by the Executive Committee." They were to "be by secret ballot, and so conducted as to avoid undue influence or interference with voters in any manner whatsoever and to prevent any fraud in the counting of ballots." Article IV also provided that "on the day of nomination each duly qualified voter shall be furnished with a ballot on which *he shall write* the names of the persons he desires to nominate as Representatives." (Italics ours).

When the two provisions which are the subject of criticism are read together it will be apparent that there is nothing reprehensible about the provision that "nominations and elections shall be arranged for by the Management's Representative (Mr. Robeson). This provision is not found in the 1937 plan.

It is clear that when the Board found that "elections were arranged for by the 'management's representatives' ", meaning, of course, the appointed representatives of the management, it labored under the erroneous notion that because appointed representatives of the management equaled in number the elected representatives, the Company controlled the elections. Such is not the case, and the evidence is that all elections were fairly held, without the exertion of any influence whatever by the Company. It was so stipulated. The Board has not contended to the contrary beyond the erroneous statement in its decision now admitted to be error.

However, as stated, this error is fundamental. It necessarily had a part in erroneously influencing the judgment of the Board in reaching its final conclusion and its order thereon.

CASES CITED BY THE BOARD EASILY DISTINGUISHABLE ON THEIR FACTS

Counsel for the Board at page 31 of their brief say:

> "As we have shown above, even after the 1937 revision the Plan was indistinguishable, except in minor matters of detail, from the organization which was ordered to be disestablished in National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 270."

Even if it were admitted that the two plans are similar in form, this would be far from admitting that there is any similarity in the character, history and

operation of the organizations set up under them, or in their respective relations to the employer.

We have already taken occasion to point out that there is no similarity in point of fact between the instant case and the principal cases cited on behalf of the Board, namely, the Pacific Greyhound Lines case, Pennsylvania Greyhound Lines case, and the Fansteel Metalurgical Corporation case. Here we distinguish them more in detail. First, the Pennsylvania Greyhound case. In that case the officers and other representatives of the company were active in promoting the plan, in urging employees to join the association set up under the plan and in the preparation of details of organization, including the by-laws, in presiding over organization meetings and in selecting employee representatives of the organization.

None of these things happened in the instant case and there was no evidence or finding that any of them did happen. On the contrary, the uncontradicted evidence shows that they did not happen.

In the Pennsylvania case certain of the company's employees organized in May, 1936, a local union affiliated with the American Federation of Labor, and continued to hold meetings after the passage of the Act in July, 1935. Before and after that date the Pennsylvania Company and its officers were active in warning employees against joining the union and threatening them with discharge if they should join. In the instant case, as stated in the court's opinion, and fully supported by the uncontradicted evidence, respondent has never been anti-union.

The Pacific Greyhound Case. There the Company took an active and leading part in the organization of the Association and from the time of the organization up to the time of the hearing before the Board continuously interfered with and dominated the internal administration of the Association and contributed to its support. The Company twice made successful use of the Association as a means to forestall attempts to organize its employees in an outside union, once in 1933 and again in 1934. The officers of the company were active in persuading, threatening and coercing employees to join or remain members of the Association and in urging them not to join the rival unions. When, in 1935, following the passage of the act, the employees attempted to establish another labor organization, they were met by persuasion and warnings of the company's employees, as well as the company's officers not to join the new union and by threats of discharge in case they did. Nothing of the kind has happened in the instant case and there is no evidence or finding that it did.

As to the Fansteel case the Company union there involved was actively promoted by the company in the midst of a bitter labor war in its plant. There is no similiarity between the facts in that case and in the facts in the case at bar.

THE PLAN AS A CONTRACT

In certain limited aspects the Plan is a contract between Respondent and its employees. Inartistically drawn it certainly is. It bears internal evidence of having been the work, not of lawyers, but of laymen. Thus "any article in this book (sic) may be amended,"

etc. (Board Ex. 1-K R. 152). The Board says (brief 28) the Plan is obviously not a contract because "no one is bound to do anything. There is no provision for signatures and there are none in fact." Here again counsel reveal their philosophy that a promise, to be binding, must be in writing and signed; and here again they misstate the facts when they say no one is bound to do anything. Certainly all of the employees who adhere to the Plan and exercise their right to vote under it are bound by its provisions; and Respondent having recognized the organization with knowledge of the provisions of the Plan under which it functions, is *bound* to appoint a "Management's Representative" (Art. V, R. 150), whose duty it is to keep the management in touch with the Employee Representatives; and is also bound to treat with any employee or group of employees having a grievance, as provided by the Plan (Art. VII, R. 151-2). The Plan is regarded by the employees as a contract.

Mr. Wilkins testified R. 90:

> "Well, suppose we pass that by, and let me ask you this question, Mr. Wilkins. You are referring to Board's exhibit 1-K, are you? Are you familiar with this book?
>
> "A. Yes, sir; I am.
>
> "Q. What does that represent, Mr. Wilkins, so far as the employees in the yard are concerned? What is their understanding of that?
>
> "A. That is a contract between the management of the yard and the employees, together with the conditions and plan of operation of correcting any unsatisfactory conditions under which the employees work."

Counsel for the Board seem to attach importance to the fact that the word "Agreed" does not appear in the preamble of the 1937 Plan (Footnote 10, brief 28).

The closing words of that preamble, after reciting the purposes of the organization, are:

> "the principles of employee representation are hereby *reaffirmed* by the employees and the Company and to those ends the following *rules* are *hereby adopted*" (R. 147. Italics supplied).

Between *reaffirmed* and *agreed*, there would seem to be little to choose. It is upon such trifles as this that the Board has built its case.

To the extent indicated above the Plan is a contract between respondent and its employees. It is not, in itself, an agreement fixing hours, wages and conditions of work. Agreements of that class are made with the Committee pursuant to it. Whatever its artistic defects it has always been interpreted on both sides to mean that respondent has nothing to do with the internal affairs of the Committee. In those affairs it has never interfered.

ADJUSTMENT OF GRIEVANCES

The Board's counsel vigorously denounce the grievance procedure provided by the Plan. They say it "ended in a blank wall"; and that arbitration could be had only if Respondent's President agreed (Brief 21, 22), failing to state that the employees must also agree. They refer to this as "an abortive procedure" for the arbitration of grievances (Brief 23). They overlook the fact that the same things may be said of any

agreement to recognize an outside union, and that they involve no violation of the Act.

This Court has held that

> "The provision of section 9 (of the Act) * * * * imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute."
>
> * * * * * * * *
>
> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. *National Labor Relations Board* v. *Jones & Laughlin S. Corpn.*, 301 U. S. 1, at pp. 44, 45.

Negotiation in any case may "end in a blank wall." For such situation the act reserves to labor the powerful weapon of the strike. That privilege is nowhere denied the employees in the Plan involved in this case.

ARTICLES VI AND IX

We need not concern ourselves with the question whether these two articles of the Plan have or have not been eliminated. As shown more in detail, post pp. 75-77, the court below, before referring to their elimination, had sustained the contention of both Respondent and Intervener, based upon the practical construction given the Plan throughout its history by both. Thus R. 229:

> "The Shipbuilding Company and the Employees' Representative Committee assert that the provisions of Articles VI and IX were understood by them to apply to matters pertaining to the rights of the company under the plan, and

were not intended to affect or restrict the independence of the committee in its capacity as a representative of the men. The Board on its part contends that the plan clothes the company with power in each instance to veto every proposal adopted by the committee, and every proposed amendment to the plan itself. In our opinion, the view of the Shipbuilding Company and the Employees' Committee is more nearly correct, and it is of significance that in the actual operation of the plan, the provisions objected to have never been invoked by the company."

To illustrate what is meant by "matters pertaining to the rights of the Company under the plan."

First as to Art. VI.

We point to the testimony of Mr. Wilkins, *ante*, pp. 58-60. Here it is clearly shown that in the usual course, questions of wages, hours and conditions of work were taken up first in the Committee. They were there thrashed out and a resolution embodying the wishes of the employees was passed and recorded in the minutes. These resolutions frequently embodied such matters as increased wages, or overtime, or vacations with pay. Naturally they could not become effective until agreed to by the Company. Hence the action of the Committee was in such cases reported to the Company, and, when approved by the latter, its requests or recommendations were put into effect. That, under the practical construction given to Art. VI by both parties throughout the life of the Plan, is the only kind of action of the Committee requiring Company approval.

Art. IX. This was understood by both parties in the same way. The Plan imposed upon Respondent

the duty of appointing a Management's Representative to keep Employees and Management in touch with each other and of guaranteeing the independence of representatives, and also the duty to permit any employee or group of employees to take up any grievance with officers of the Company. It is manifest that should the plan be so amended as to impose additional duties upon the Company, the latter had the right to say whether it would, under such conditions, continue to recognize the Committee as an agency for collective bargaining. This was the reason and the only reason for the provision that amendments be submitted to the Company.

The various plans have always been so understood by both employer and employee. The practical construction which the parties put upon the terms of their own contract is entitled to prevail over the literal meaning of the contract. *District of Columbia* v. *Gallaher*, 124 U. S. 505.

And where a written instrument is susceptible of two interpretations, one of which makes it illegal (the effect of the Board's interpretation) and one of which makes it legal (the effect of the interpretations of petitioner and its employees), the interpretation which makes the instrument legal will be adopted by the Courts. *Great Northern Ry. Co.* v. *Delmar*, 283 U. S. 686; *Hobbs* v. *McLean*, 117 U. S 567

We might add that this provision of Article IX was a distinct limitation upon the Company.

The Board's counsel repeatedly aver (brief pages 35 to 56) that the court below bottomed its conclusion that paragraph 2 (a) of the Board's order ought not to be enforced largely upon assertions by counsel for

the intervener, and data contained in the Board's Supplemental Certificate. These alleged assertions and data were:

> (a) Statement by counsel for the intervener made in a reply brief filed after argument in the court below to the effect that since the argument Articles VI and IX of the plan had been amended; and
>
> (b) The data submitted to the Board by counsel for the intervener after the argument before the Board, but prior to its decision, regarding the referendum mentioned in the Board's supplemental certificate (R. pp. 215-19).

First, as to (a). On the argument in the court below counsel for the Board "requested the privilege of filing additional briefs and this privilege was accorded to all parties" (Opinion R. 230). In his reply brief filed pursuant to this leave counsel for the intervener made the statements set out in footnote 14, pages 37-78 of the Board's brief. But the context of the Court's opinion clearly shows that it was not influenced by these statements of counsel. In its decision the Court had already indicated its agreement with the contentions of the Committee and the Company that Articles VI and IX properly construed in the light of the evidence meant only that those provisions

> "were understood by them to apply to matters pertaining to the rights of the Company under the Plan, and were not intended to affect or restrict the independence of the Committee in its capacity as a representative of the men" (Opinion R. 229).

The court, after stating the respective contentions of the parties, correctly held (R. 230):

> ". . . In our opinion, the view of the Shipbuilding Company and the Employees' Committee is more nearly correct, and it is of significance that in the actual operation of the plan the provisions objected to have never been invoked by the company. . . ."

It was after the court had thus definitely decided the point that it employed the language to which counsel for the Board take exception. This was evidently done merely to show that the question was no longer of *practical* importance. The court said:

> "The controversy, however, is no longer of importance, since both of the provisions have now been eliminated from the plan. During the argument of the case in this court, counsel were invited to discuss the propriety of a modification of the order of the Board so as to require the elimination of the provisions objected to, rather than a disestablishment of the organization. Counsel for the intervening organization stated that on its behalf he had unsuccessfully requested the Board to advise him what changes in its opinion would render the plan free from objection. Counsel for the Board requested the privilege of filing additional briefs, and this privilege was accorded to all parties. We learn, from the briefs filed *in reply to the Board's supplemental brief*, that Articles VI and IX have been amended by striking therefrom the provisions to which objections has been lodged."

The repeated statements of counsel for the Board that the decision below was wrong *because* it was "bot-

tomed" upon assertions of counsel not in the record (Brief pp. 35 et seq; 45 et seq), or because it was based on the fact the Plan was amended by the employees after argument (Brief pp. 37, 46), and was "used as a basis for modifying the order of the Board" (R. 48), are groundless.

The language in the opinion of the court below to which the Board's counsel take exception was a *dictum*, it was unnecessary to the decision and was harmless. The court's view previously expressed that the plan as written does not mean what the Board contends is in no respect affected. The decision will stand unaffected even were the language excepted to extracted bodily from the opinion.

Thus it is made evident that the question whether or not the matter was "moot" is nowhere involved, as counsel for the Board seemed to think (Brief pp. 48-49). This is necessarily true because the Court's decision is based upon its own construction of the printed language of the plan and not upon any action taken by the Committee subsequent to the argument.

Second (b). This data, as has been previously stated supra, pp. 36-7, was certified by the Board as a part of the record. The point was not made in the court below, and is otherwise without merit.

It is settled practice in the Federal Courts that objections must be timely. As early as 1878 this Court refused to consider an objection to the judgment of the Circuit Court, which could have been but had not been called to the attention of that Court. *Newcomb* v. *Wood*, 97 U. S. 581. This Court said:

"Two of the three referees only signed the award, but the attention of the court was not called to the fact when the report was confirmed and the judgment was entered. The omission was amendable, and *non constat* but that the amendment could and would have been made if the objections had been suggested. It would be fair neither to the court nor the other party to permit the objection to be raised here for the first time. Under the circumstances, it must be held to have been *conclusively waived*, and the plaintiff in error cannot be heard now to insist upon it." (Citing cases). (Italics ours).

UNAFFILIATED UNIONS ARE LEGAL

There is nothing in the Act to forbid the formation and maintenance of an unaffiliated union.

"A union limited to the employees of a single employer is as legal as any other." *Ballston-Stillwater Knitting Co., Inc.* v. *National Labor Relations Board*, 98 Fed. (2) 758 at p. 762.

Nor was the Act intended to prevent normal relations and friendly intercourse between employer and employee.

As was said by this Court of the Railway Labor Act of 1926, its language

"is not to be taken as interdicting normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employees." *Texas & N. O. R. Co.* v. *Brotherhood R. & S. S. Clerks*, 281 U. S. 548-571, at page 567.

The policy of the Act can best be effectuated by encouraging normal and friendly human relationships between employer and employee.

In *Standard Lime & Storage Company* v. *National Labor Relations Board* (4th Cir.), 97 Fed. (2) 531, the court declined to follow an interpretation by the Board which, in the court's opinion, would not

> "effectuate the policies of an act designed to remove the sources of industrial strife by encouraging the friendly adjustment of industrial disputes"

Domination and interference with an employee organization cannot be inferred from the fact that feelings of mutual friendship and respect characterize the relations between employer and employees. Nor is it a sinister circumstance, as the Board appears to think in this case, that unbroken peace has prevailed throughout the history of a plant. Domination and interference mean something quite different from this.

> "The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law." Railway Clerk's case, *supra*.

Again,

> "To constitute domination or interference by the employer we think that it must appear that the employees are acting for him rather than for themselves, or that the employer in some manner gives aid to one group which he withholds from the other, or discriminates in favor

of members of a labor organization or against non-members." *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Board, supra.*

Counsel for the Board at page 39 of their brief admit that

> "The *structure* of such an organization is not conclusive in determining whether it has been foisted upon the employees and whether they are, in truth free to choose a representative" (Italics supplied).

That is quite true. These questions depend on other facts than the mere formal provisions of the Plan. Yet it was upon these formal provisions and nothing else of importance that the Board based its findings and is now urging its case.

Mr. Justice Roberts in *The Associated Press* v. *National Labor Relations Board,* 301 U. S. U. S. 103, 141, at p. 132, said:

> "Courts deal with cases upon the basis of the facts disclosed, never with non-existent and assumed circumstances."

Each case of alleged company domination and interference must necessarily be decided upon its own facts. The principle controlling the right of the Board to order withdrawal of recognition from an organization of its employees was discussed in the *Pennsylvania Greyhound* case and the *Pacific Greyhound* case, *supra.*

In each of those cases there was ample basis for the Board's order. The Court, however, made it clear that its decision was based upon the facts before it. Thus, in the Pennsylvania case, it said:

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under Section 9 (c), even though it had ordered the employer to cease unfair labor practices."

We respectfully submit that this is such a case. The court below rightly appraised the situation when it said (R. 230):

> "The National Labor Relations Act was designed to deal with the actualities of industrial life in this country, and to promote peace in relations between employer and employees by securing to employees the right, too frequently denied in the past, to organize and bargain collectively, with complete freedom and indepedence, through representatives of their own choosing. The purpose of the Act will not be served by destroying an organization that is without doubt the chosen representative of the great majority of the employees, even though it may be thought that their decision to restrict their spokesmen to American born fellow workmen is unwise. To deny them this right is to ignore the express command of the statute."

VII

THE COURT BELOW DID NOT HOLD THAT THERE HAD BEEN ANY VIOLATION OF THE ACT

Counsel say (brief p. 18) that respondent has *admittedly* engaged in "unfair labor practices" because it did not file a cross petition. It had no need to do so.

Respondent did not file an original petition for *certiorari* because the decree inhibited it only from doing what it was not then doing and had no desire to do. It is no great hardship, though perhaps a little grating on the sensibilities, to be enjoined from doing what one has no wish to do and no intention of doing. If there be anything in the holding of the court below to which respondent should now except, it can do so without a cross petition. See p. 85 post.

Counsel also say, brief p. 18, that respondent did not attempt, in its brief in opposition to the Board's petition for certiorari, to support the decision of the court below on the ground that there had been no violation of the Act. This is not true.

We quote from our brief in opposition:

> "Petitioner states that the court below upheld the conclusion of the Board that respondent had been guilty of violations of Section 8 (1) and (2) of the Act in dominating, interfering with and contributing support to the Plan.
>
> "This is a clear misconception of the action of the court. The court did not hold that respondent had been 'guilty' of violating the Act in any particular * * * * it disapproved, as not supported by substantial evidence, the ultimate finding of the Board that the Committee is still the creature of the Company; that it is company-dominated and incapable of representing the employees for purposes of collective bargaining. In the light of this holding the decree of the court below is perfectly consistent.
>
> "A 'cease and desist' order does not necessarily imply that the thing inhibited is being practiced up to and at the time of the order. At

times it is intended to operate only to prohibit future acts. This was true of the portion of the Board's order in the Consolidated Edison case, *supra,* which related to industrial espionage.

* * * * * * *

"From the whole tenor of the majority opinion below, it is apparent that when the court enforced the negative provisions of the Board's order, it meant only to bar the resumption of acts lawful when done, but which had ceased, after they became unlawful.

"Portions of the order could apply to nothing else than future acts. For instance, respondent is directed to cease and desist from

> "the formation or administration of any *other* labor organization of its employees, and contributing support to * * * * any *other* labor organization of its employees" (Italics ours). Brief in Opposition, pp. 14-16.

In view of the foregoing, we fail to understand by what process of reasoning counsel for the Board find it possible to say that respondent did not attempt in its brief in opposition to the petition for *certiorari* to support the decision of the court below on the ground that there has been no violation of the Act. Respondent urged the point.

RESPONDENT DID NOT BELIEVE THAT IT WAS SUBJECT TO THE ACT

Of course, as counsel for the Board say (brief 19), the fact that the act was not known to be constitutional until the publication of the Jones & Laughlin decision

of April 12, 1937, is immaterial. But it is not immaterial, on the contrary, it is most *material* and *important* that Respondent, relying upon the decisions of this Court, believed, and had the right to believe, that the Act did not apply to it. An unbroken line of decisions by this Court beginning with *Kidd* v *Pearson*, 128 U. S. 1, and culminating in the Schechter Poultry case, 295 U. S. 547, and in the Carter Coal Company case, 298 U. S. 238, had held that manufacturing or production, in itself, was not commerce.

Respondent was and is engaged solely in production. It did not believe that the Act applied to it. After the Board filed its complaint, respondent, in entire good faith, brought a suit to enjoin the proceeding on the ground that the Act had no application to it, and in consequence, the Board was without jurisdiction. It had been held by the Circuit Court of Appeals for the First Circuit in *Myers v. Bethlehem Shipbuilding Company*, 88 Fed. (2) 154, 89 Fed. (2) 1000, that the Act did not apply to the business of building and repairing ships, and that the Board had no jurisdiction of such a business (Reversed by this Court on other grounds, 303 U. S. 41). Surely respondent is not to be condemned for relying upon the decisions of this Court to the effect that production is not commerce, nor to be punished for seeking to ascertain its rights by an orderly proceeding in court.

Respondent still did not believe that the Act applied to it. That being so, it would not be surprising had it disregarded the Act altogether. However all that did happen was, that the bill for printing the booklet containing the Plan printed in May or June 1937, was paid

by the Company; and prior to the hearing minutes of the Committee had been mimeographed in one of its offices, though there is no evidence that the Company knew of this. Doubtless it would, at that time, have consented if it had known it. The distribution of minutes to the members of the Committee through the Shipyard's messenger service *means nothing*. That service is available for the free and unrestricted use of any employee of the Yard for purely private and personal services (Blanton, R. 43; Wilkins, R. 110).

It is upon such *trivia* as this that counsel assert that respondent had violated the law, or was at the time of the hearing doing the things that the negative portions of the Board's subsequent order prohibited.

But if the fact that the court upheld these negative provisions can possibly be construed as a holding by the court that respondent had violated the law, rather than as above indicated, a mere prohibition against the resumption of acts lawful when done but which had ceased after they became unlawful, then that construction or holding is wholly without evidence to support it, and should be disapproved.

In saying this we seek no enlargement of the rights of respondent under the decree and no diminution of the rights of its adversary.

> "Without a cross appeal, an appellee may urge in support of a decree any matter appearing in the record, although involving an attack on the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it. What he may not do in the absence of a cross appeal is to attack the decree with a view, either to enlarging his own rights thereunder or of

lessening those of his adversary, whether he seeks to correct an error or to supplement the decree with respect to a matter not dealt with below." *Morley Const. Co., et al* v. *Maryland Casualty Co.*, 300 U. S. 189-193. Opinion by Mr. Justice Cardozo.

CONCLUSION

The Board arbitrarily discarded practically all of the evidence that was favorable to Respondent and the Intervener. That evidence shows conclusively that paragraph 2 (a) of the Board's order was unwarranted either in law or in fact. It disclosed a perfectly tranquil situation at Respondent's plant—an industrial peace unbroken throughout the history of Respondent's business. It establishes beyond cavil that the Employees' Representative Committee has contributed to that peace; that through it the employees have not only safe-guarded and protected their own rights and interests; but have promoted and fostered a spirit of friendly cooperation between themselves and Respondent. The facts established by this discarded evidence are summarized in the opinion, *ante*, pp. 40, 41, 42 and also at p. 56; *ante*, in connection with the testimony of the Chairman of the Board before the Senate Committee now considering amendments to the Act. That these facts are proved by the evidence in the record is not only clearly shown by the record itself, but, as previously noted (*ante* p. 56), has been publicly admitted by the Chairman of the Board. That the Board thought them immaterial does not exclude them from the consideration of the Court. On these facts it is clear that there is no menace to commerce, past, present or prospective in the existence and functioning

of the Employees' Representative Committee at Respondent's plant. Without a threat to commerce, actual or reasonably to be apprehended, such apprehension to be founded not upon suspicion, speculation or guess work, but upon facts, the Board lacked authority to order the disestablishment of the Committee, or the withdrawal of recognition from it. For this reason, and also because it was punitive in its origin and intended operation and effect paragraph 2 (a) of the Board's order is void. There was no warrant in the evidence for the passing of an order for the destruction of "an organization that is without doubt the chosen representative of the great majority of the employees" (Opinion R. 230).

For these and other reasons stated in the foregoing pages of this brief, we respectfully submit that there is no error in the decree of the court below of which the Board can complain, and that the said decree should be affirmed.

Very respectfully submitted,

FRED H. SKINNER,
H. H. RUMBLE,
Counsel for the Respondent.

FRED H. SKINNER,
JOHN MARSHALL,
Newport News, Virginia,

RUMBLE & RUMBLE,
Norfolk, Virginia,
Of Counsel.